

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
) Plaintiff)
) NO. 1:08-cr-15-LJM-KPF-02
) Indianapolis, Indiana
) November 18, 2011
DONELLA LOCKE,)
)
) Defendant.)

Before the

Honorable Larry J. McKinney

TRANSCRIPT OF DEFENDANT'S RESENTENCING HEARING

APPEARANCES:

For the Government: Office of the United States Attorney
 Gayle Helart, AUSA
 10 West Market Street, Suite 2100
 Indianapolis, IN 46204

For the Defendant: Jenner & Block LLP
 By: Landon S. Raiford and
 Joel T. Pelz
 355 N. Clark Street
 Chicago, IL 60654-3456

 Baker & Daniels LLP
 By: Matthew T. Albaugh
 300 N. Meridian Street, Ste. 2700
 Indianapolis, IN 46204

Court Reporter: Frederick C. Pratt, CSR
 290 U.S. Courthouse
 Indianapolis, IN 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND
COMPUTER-AIDED TRANSCRIPTION

1 (IN OPEN COURT.)

2 THE COURT: You may be seated. This is, as you
3 know, set for a resentencing of Donella Locke after the issue
4 has been spoken to by the 7th Circuit.

5 And the record will reflect the filing of, I guess,
6 two motions in limine. One having to do with evidence
7 regarding relevant conduct as it relates to, I think it's
8 paragraph 71 of the presentence investigative report on the
9 calculation of the guidelines, whether two points are added
10 for 10 or more victims when the counts of conviction did not
11 add up to 10. And the other had to do with the amount of
12 restitution, as the order of restitution reflected what I had
13 called at sentencing "relevant conduct." I think the
14 difference between the two numbers is around a million
15 dollars. So these two motions in limine addressed those
16 issues.

17 The point of the motions in limine by the defense is
18 that there be no new evidence added today at the sentencing
19 and that, as I understood the response, that the government
20 had in mind some further evidence that might not have been
21 entertained at the last sentencing.

22 So what I'd like to do is this. I'd like to have five
23 or 10 minutes of your best shot on those two motions in
24 limine, and then I intend to rule on those motions in limine,
25 but not until I've heard what you have to say on the issues.

1 And then we'll proceed to resentencing under the guidelines
2 that I conclude are appropriate after hearing your arguments
3 on the motions in limine, unless you would like to stand on
4 your motions. I have to say, I have read your motions.

5 So, what would you like to do, sir?

6 If you'd give us your name, and I'll write it down so
7 I don't forget it.

8 MR. RAIFORD: Landon Raiford. Raiford is
9 R-a-i-f-o-r-d.

10 The defense would like an opportunity to argue the
11 motion, if Your Honor's willing.

12 THE COURT: Well, that's why I announced that I
13 would be willing.

14 MR. RAIFORD: We will take you up on that offer.

15 THE COURT: And I do have the right to limit this.
16 I don't want to go until next Thursday afternoon. Just as
17 soon -- can you give me your best in about 10 minutes or so?

18 MR. RAIFORD: Absolutely.

19 THE COURT: All right. Let me have it, Mr. Raiford.

20 MR. RAIFORD: Thank you, Your Honor. The 7th
21 Circuit is fairly clear that on remand the trial court is
22 limited to the evidence that it had at the time of either, A,
23 the initial trial or, B, the original sentencing.

24 We have --

25 THE COURT: And I saw the two cases brought to my

1 attention by the government on those, and then I read your
2 opinion on why those two don't apply in this case.

3 What's the general reason why, on remand, a trial
4 court on sentencing is limited to what he's already heard?

5 MR. RAIFORD: Because I think the basic principle
6 would be very unfair to the defendant when the government at
7 trial has had a full opportunity --

8 THE COURT: Does it have any constitutional
9 implications?

10 MR. RAIFORD: It does. In fact, due process, 6th
11 Amendment, right to jury, all--

12 THE COURT: Any double jeopardy problems?

13 MR. RAIFORD: Double jeopardy as well. All this is
14 implicated when you use the sentencing proceeding to
15 circumvent the jury trial, which when in those instances the
16 government had all the evidence needed at the time of the
17 initial trial; making the strategic decision not to put that
18 evidence into the record; makes the strategic decision not to
19 put that evidence into the record at the initial sentencing;
20 it gets appealed; it gets remanded; the government should not
21 be given a third opportunity to bolster their case.

22 In situations where the Rules of Evidence aren't
23 applied nearly as strictly --

24 THE COURT: Tell me what you think the basic reason
25 why -- if you can say it in a sentence -- why the 7th Circuit

1 reversed this sentencing?

2 MR. RAIFORD: Because they found there was
3 nothing -- I believe they found there was nothing in the
4 record to support either the restitution award or to hold
5 Ms. Locke accountable for the alleged relevant conduct.

6 THE COURT: So is the problem evidentiary or is the
7 problem, I think I could use the phrase "inarticulateness of
8 the Court"?

9 MR. RAIFORD: I believe the problem is evidentiary.
10 In this case the problem is a complete lack of evidence.

11 THE COURT: And you draw that conclusion from what
12 part of the opinion?

13 MR. RAIFORD: Well, I believe our arguments before
14 the Court were -- and I think the opinions adopts our
15 belief -- they presented no evidence. For example, the 7th
16 Circuit notes all that was presented before the Court was the
17 P.S.R. report, and I believe they talk about it's just a
18 summary of names and figures, and how that is not nearly
19 sufficient to support a finding. And I think the one case --
20 and I'm trying to keep this short -- McGowen remand. McGowen
21 was very, very broad. And on the second appeal the 7th
22 Circuit rejected the argument the government will make today,
23 which is on a general remand you have the opportunity to look
24 at basically whatever you want. The 7th Circuit said no,
25 you're limited to the record before you either at trial or

1 sentencing, but the government is precluded from introducing
2 new evidence at the resentencing.

3 THE COURT: Okay.

4 MR. RAIFORD: Thank you, Your Honor.

5 THE COURT: Thank you. Good afternoon.

6 MS. HELART: Good afternoon, Judge.

7 THE COURT: You've heard the questions that I asked
8 Mr. Raiford.

9 MS. HELART: Yes.

10 THE COURT: Now would you respond to those
11 questions?

12 MS. HELART: Well, I would respond looking at the
13 language that the 7th Circuit remanded with that was in the --
14 in my sentencing memorandum.

15 The defense would argue that we have to go back now
16 and make findings on the current record before us, but the 7th
17 Circuit already knew what the record was. The 7th Circuit's
18 language now is "we acknowledge that the district court might
19 find, based upon sufficient evidence presented during
20 resentencing, the conduct in the unconvicted counts relevant
21 to Locke's sentencing."

22 So, if the defense reading were correct and the only
23 thing available to the Court today was the current record,
24 then the 7th Circuit's language would more likely have been
25 consistent with the statement "there's nothing in the record

1 that supports these findings," and then it could have remanded
2 with the directions for this Court to simply sentence based on
3 the record before it with the 1.1 million dollar restitution
4 for the five counts and the lower sentencing range because
5 there would not have been 10 or more victim lenders. But
6 that's not what the language of the 7th Circuit was. And the
7 7th Circuit already knew what the record was.

8 The 7th Circuit directed that this Court look at
9 whether Locke's conduct represents five discrete schemes to
10 defraud separate from Beverly Ross, or whether there was an
11 overarching scheme perpetrated against a number of victim
12 lenders that were encompassed by looking at the entirety of
13 Counts 2 through 37, or for certain the 14 counts that Donella
14 Locke was charged with.

15 The defense would want this Court to find that there
16 were three separate schemes; namely, Donella Locke by herself;
17 Beverly Ross by herself; and the two women together. But, no,
18 this is a joint scheme, which will be shown by the documents
19 that were in the lender files. There are numerous fact
20 features that show this with the evidence that the government
21 has from the investigation.

22 At sentencing there's -- the defense would also have
23 this Court believe that there was just absence of any evidence
24 relating to the issues today, but that's not true.

25 At sentencing, Locke withdrew her objection to the

1 2.3 million dollar loss amount question. She knew by that
2 withdrawal that she was agreeing that the 2.3 million dollar
3 amount included more than the five counts of conviction.

4 She also knew that it included properties to which she
5 had been charged with her codefendant Beverly Ross. She saw
6 the list in the P.S.R., which included victim lenders, more
7 than the five counts of conviction. She heard the
8 government's argument that spoke of several facts relating to
9 a common plan or scheme and a scheme to defraud, and she heard
10 this Court discuss a two year time period and all the
11 attendant fraud in that time period.

12 What this remand does is not inconsistent with McGowen
13 II as the defense would argue. It is a flushing out of what
14 is already there. It is also consistent with Husband and
15 Sumner, where additional testimony was taken and affirmed on
16 their -- with the 7th Circuit that -- where it was taken to
17 flush out the issue that was already present at sentencing.
18 In Sumner, the remand included the agent's testimony relating
19 to similarity, regularity and temporal proximity of two
20 different drug selling events. In Husband, taking testimony
21 from doctors and agents relating to the issue of
22 constitutional reasonableness.

23 We are flushing out evidence that will support
24 findings or not of the issues sent back by the 7th Circuit:

25 Are there 10 or more victims that were victims of a

1 common scheme or plan?

2 Was this a scheme to defraud, such that the
3 restitution amount can be supported?

4 None of this is new to Locke. She withdrew her
5 objection to that very same amount, as it related to loss,
6 knowing full well that it related to five counts of conviction
7 and her sentencing range clearly was based on loss relating to
8 more than --

9 THE COURT: Did the 7th Circuit note that?

10 MS. HELART: Note what?

11 THE COURT: Did the 7th Circuit note the withdrawal
12 of that objection?

13 MS. HELART: I don't think that was an issue on
14 appeal because she had withdrawn it. I mean, I do not recall
15 the parties talking about the loss amount, but we know that
16 from the sentencing record. That was not an issue necessary
17 for appeal.

18 THE COURT: Even in the face of that, the
19 restitution order was sent back?

20 MS. HELART: Correct. But it was a different issue
21 because that's a scheme to defraud and not relevant conduct
22 versus her withdrawal made the issue unnecessary, I suppose,
23 on the appeal.

24 THE COURT: Okay. Anything else?

25 MR. RAIFORD: Very briefly, Your Honor.

1 THE COURT: Sure.

2 MR. RAIFORD: I just want to add the government's
3 point that the 7th Circuit, if it really wanted to, would have
4 been very, very explicit about exactly what can and can't be
5 done. I think, as Posner says, though the Court is not --

6 THE COURT: That would be Judge Posner, for the
7 record.

8 MR. RAIFORD: Sorry. Judge Posner says judges are
9 like pigs searching the record for trouble. If that were the
10 case, Nobel would have come out completely different because
11 there, there was something in the trial record that had been
12 overlooked, and the Court didn't go through and search,
13 exhaust the record to find out. So what it does is rely on
14 the District Court to go back and determine, look at what was
15 before it, and then make a decision based on the evidence
16 initially presented that could support its finding. It's not
17 the 7th Circuit's job to go through and dig through everything
18 that was at issue and determine whether a District Court could
19 do that.

20 THE COURT: All right. Thank you.

21 MR. RAIFORD: Oh, sorry, Your Honor. One more
22 thing. In our opening brief we did note that counsel withdrew
23 the objection.

24 THE COURT: Okay. So where does that leave you
25 then?

1 MR. RAIFORD: Because the point we made at the 7th
2 Circuit was that Locke in the -- and the 7th Circuit noted
3 this twice, once in the body of the opinion and once in a
4 footnote, that Ms. Locke has always disputed she's responsible
5 for the relevant conduct. It's one thing to withdraw the
6 objection to that alleged conduct --

7 THE COURT: Okay.

8 MR. RAIFORD: -- she never withdrew the objection
9 that she shouldn't be held responsible for it.

10 THE COURT: Thank you. Well, I appreciate the
11 briefs in this case on the issue that's now before the Court;
12 that is, the extent of the remand, what this Court is directed
13 to consider at the second sentencing hearing.

14 I appreciate you bringing it up in a motion in limine.
15 I thought it was an unusual title, but it does the job. It
16 puts the issue to the Court, as it should be, and it gave me
17 enough time to look at it in advance so that I could make a
18 reasoned decision on it.

19 As I said, this issue goes to the one paragraph of the
20 Presentence Investigative Report. So whether this is
21 adequately considered as a 23 on the offense level calculation
22 or a 25 isn't a very important notion for us today.

23 What I consider in arriving at that conclusion is also
24 equally important. I looked at the direction from the 7th
25 Circuit in that comments that are made, and I read this from

1 page 23 of my copy, which is the advance sheet, and it says
2 this -- in the middle of the first full paragraph on that page
3 and it says -- and this is in somebody's brief -- It says,
4 "Given the lack of evidence before the District Court, and the
5 lack of an explicit adoption of a P.S.R., presentence report
6 containing an adequate relevancy analysis, we're left with the
7 definite and firm conviction that the District Court made a
8 mistake in considering the transactions underlying the
9 dismissed counts as relevant conduct."

10 Now, that very clearly tells me that the 7th Circuit's
11 opinion is that there was a lack of evidence before the Court,
12 before me, on the issue of relevant conduct.

13 Now, as a general rule, at a second sentencing, as I
14 understand the law, you don't open it up carte blanche to see
15 if the second time around evidence could be presented that
16 would have supported the Court's conclusion the first time
17 around. That's not the law of the 7th Circuit.

18 There were those cases that are cited by both counsel
19 on the issue, which appear in the McGowen I and II, and the
20 other case's name I can't recall. The point is those are
21 specific fact sensitive cases, as is this one.

22 So I just read you what I think is the holding in this
23 case. And that does not mean that I can't read what counsel
24 for the government just read me. That's also in the case.
25 It's on page 24 where it says, "At the same time, we

1 acknowledge that the District Court might find, based upon
2 sufficient evidence presented during resentencing, the conduct
3 in the unconvicted counts relevant to Locke's sentencing. It
4 could then state its findings with specificity and presumably
5 enter the same sentence we vacate today."

6 Then the Court says, "We express no opinion on the
7 propriety of that outcome. Because no particular outcome is
8 certain, we remand for resentencing."

9 I have to confess, I'm not sure exactly what that
10 means. But I think that is cautionary to this Court regarding
11 the second sentencing, and I think it is coupled with the
12 first paragraph that I read into the record. I think what
13 this means is that I am not to invite more evidence into this
14 case.

15 I think the motions in limine are well taken given the
16 language of this opinion, and I think even aside from the
17 language of the opinion that they are well taken. I don't
18 believe that our system will countenance a second attempt to
19 make a record of evidence that the 7th Circuit has found was
20 not in existence the first time around.

21 So that being said more specifically, the sentencing
22 today, the resentencing is restricted to what was in the
23 record at the time that I sentenced Mrs. Locke the first time.
24 So I will not entertain evidence that wasn't there the first
25 time.

1 So is that clear enough?

2 MS. HELART: That is clear.

3 THE COURT: Okay. All right. And that will be
4 true -- well, that impacts both the restitution order and the
5 sentence itself.

6 Usually at a sentence I will hear from the defendant
7 first, but -- I guess it would be appropriate to do that again
8 this time. So, Mr. Raiford, I'll hear from you and your
9 client, if you like, after consultation.

10 MR. RAIFORD: In light of your ruling, can we have
11 maybe five minutes to think about what we -- what we should
12 just say or even maybe a couple minutes?

13 THE COURT: You want me to step down so you have
14 privacy?

15 MR. RAIFORD: I don't want you to have to sit up
16 there --

17 THE COURT: Take the time you need.

18 MR. RAIFORD: We'll just step out.

19 THE COURT: I think I'll step down. Let me know
20 when they're ready.

21 (Recess taken from 2:30 p.m. to 2:40 p.m.)

22 THE COURT: You may be seated.

23 All right, counsel, you want to step up here with your
24 client? If this had been the first sentencing of your client
25 I would invite you and she up as I do again. And could you do

1 your best to raise your right hand, please?

2 DONELLA LOCKE, DEFENDANT, SWORN

3 THE COURT: The record then would reflect, counsel,
4 that your objection to the sentencing is to paragraph 71 and
5 to those paragraphs regarding the total restitution?

6 MR. RAIFORD: That's correct.

7 THE COURT: And then at this point I'll hear from
8 you regarding your objection to paragraph 71. And once I
9 determine what the guidelines will be, I'll hear from you
10 again as to what you think the appropriate sentence ought to
11 be.

12 MR. RAIFORD: Your Honor, based on your ruling
13 earlier today, you decided we are limited to what happened
14 initially.

15 THE COURT: Yes.

16 MR. RAIFORD: There was no evidence on the relevant
17 conduct proceeding either at trial or the initial sentencing.
18 Therefore, Ms. Locke should only be sentenced based on her
19 convicted conduct, which is Counts 8, 9, 10, 11 and 14. The
20 Supreme Court has held that the presentence report does not
21 count because it did not have sufficient evidence.

22 I would also note the 7th Circuit noted, and I quote,
23 "The government concedes the five counts on which Locke was
24 convicted did not involve 10 or more victims." Therefore, a
25 two point reduction should be taken into account there because

1 I believe her victim -- the victim list for victim conduct may
2 be six or maybe seven -- either six or seven.

3 I would also point out that the restitution, based on
4 the information the government provided us in the restitution
5 memorandum for convicted conduct, comes up to 423,675.51.

6 And one more point I would like to make. That would
7 also seem to imply or require that the loss amount would be
8 for the very same. It would not be for over a million
9 dollars, but it, too, would be at most 423,675.51. And,
10 therefore, another two point reduction should be taken into
11 account based on that.

12 Now, counsel -- in complete disclosure, counsel did
13 withdraw that objection initially at sentencing. The reason,
14 based on my review of the record, was when he filed his
15 objection he got a response back from the probation officer
16 which told him the loss amount for Count 9 was basically 1.1
17 million dollars. And based on that information he withdrew
18 the objection because the convicted conduct would be over a
19 million dollars. We now know, based on what the government
20 provided, that was not the case.

21 Therefore, I would ask the Court in fairness to make
22 sure that the loss amount adequately reflects what we know
23 restitution to be, which is about \$400,000.

24 THE COURT: The 7th Circuit mentions the figure of
25 1,371,476.51 as the amount that impacts the five counts of

1 conviction.

2 MR. RAIFORD: That's correct. And so -- I
3 understand you may be hesitant to go outside that, so maybe I
4 would ask Your Honor to take into consideration when you look
5 at the Sentencing Guidelines how you want to fit Ms.
6 Locke into the Sentencing Guidelines, the fact we know now
7 that that number is actually incorrect. And the reason it
8 wasn't brought up to you earlier is because it seems like
9 previous counsel had been, probably, accidentally misinformed as
10 to what the loss amount was for the convicted conduct.

11 THE COURT: Are you objecting to paragraph 70 also?

12 MR. RAIFORD: I would like to object to paragraph 70
13 also.

14 THE COURT: And the reason for that is?

15 MR. RAIFORD: Because we know for a fact that the
16 convicted conduct does not involve a loss amount of over one
17 million dollars.

18 THE COURT: And what is the amount?

19 MR. RAIFORD: According to the government, what they
20 submitted to this Court, they represent that it is 423,675.51.
21 I could break it down per count if that would help.

22 THE COURT: No, that's not of concern to me at this
23 point. What would that mean then that the...

24 MR. RAIFORD: I believe what it would mean is to the
25 base offense level for this conviction is 7. If we accept the

1 423 number for the loss amount, then you would add an
2 additional 12 points to give her a total of 19.

3 THE COURT: Okay. Anything else?

4 MR. RAIFORD: That is all for now, Your Honor.

5 THE COURT: You don't have any dispute with the
6 criminal history computation?

7 MR. RAIFORD: I'm understanding the criminal history
8 shows I.

9 THE COURT: It's a I, which is the lowest.

10 MR. RAIFORD: Right.

11 THE COURT: All right. Thank you.

12 MR. RAIFORD: Thank you.

13 THE COURT: I'll hear from the government on that
14 guideline calculation.

15 MS. HELART: Well, my understanding is that we are
16 here on two issues, and what I just heard the defense argue is
17 a third, and I'm not sure that that's properly before this
18 Court and we would object to that.

19 The loss amount is not in question here. She withdrew
20 her objection to that. And the calculation for that should be
21 based on the between 1 million and 2.5 because she agreed that
22 2.3 was the amount of loss. So we definitely object to the
23 defense trying to recalculate based on that when she clearly
24 withdrew that.

25 The record at the time, which as we understand this

1 Court is holding to, the defense cannot dispute that she
2 agreed to the loss amount. The loss amount included more than
3 the five counts of conviction and she knew that. The scheme
4 was set forth in the indictment. There were 13 or so victim
5 lenders in the P.S.R., which clearly included more than five
6 counts of conviction, and that would support the 10 or more
7 victims.

8 And one thing that the Court of Appeals stated is that
9 this Court did not adopt the P.S.R. officially, so we would
10 ask the Court to do that.

11 THE COURT: I think they have more of an objection
12 to more than that. In one place they said that I did not
13 adopt it, and then in another they say that it did, then
14 there's a further explanation as to what the gravamen of my
15 statement adopting the record was, that it wasn't sufficient,
16 and then they later find I think that the P.S.R. by itself is
17 not sufficient.

18 MS. HELART: And I agree with that. There was more
19 to it, but that was one of their points. So the list of
20 victim lenders happened to agree with and be the same as the
21 amount of loss. And today the defense would like to, I think,
22 engage in some speculation as to why the defense withdrew.

23 I could share things outside of the record as well as
24 to why the defense withdrew, but that would be entirely
25 improper, so we're asking the Court not to engage in any of

1 that speculation as to why defense withdrew.

2 We're asking that the Court keep the 2.3 million
3 certainly in loss. That just seems patently clear that's
4 nothing that we're here on today. And because of the other
5 features that it was listed in the P.S.R., it was before this
6 Court, and to keep that amount to restitution.

7 Now, if the Court -- well, I'll keep my argument to
8 that at this point. I think that's all that the Court has
9 asked for at this point.

10 THE COURT: I'm interested in the loss being over a
11 million dollars. You say that isn't before the Court because
12 that's not nowhere contained in the opinion of the 7th
13 Circuit?

14 MS. HELART: That was not an issue. What the
15 government is saying is that was not an issue that was raised
16 on appeal.

17 THE COURT: So the issue on appeal is paragraph 71
18 and the total amount of restitution.

19 MS. HELART: Correct. And the same list of victim
20 lenders was in paragraph 67 as well, and that was another
21 paragraph that she did not object to. So that same list of
22 victim lenders supported the loss and it supported the
23 restitution. So with her withdrawal to the loss amount,
24 implicitly she was agreeing that that was the loss amount.

25 Now, that happened to be at the sentencing the amount

1 of restitution. As time has gone on, we have more concrete,
2 more accurate numbers for the restitution.

3 THE COURT: And what is the number on the seven
4 counts?

5 MS. HELART: On the five counts?

6 THE COURT: I'm sorry, the five counts.

7 MS. HELART: The number on the five counts of
8 conviction -- and the reason the number changed, Your Honor,
9 is that -- the number is 340,789. The reason the numbers
10 change in mortgage fraud cases is because we work with the
11 best information we have at any given point in time. At the
12 time of the sentencing most of these houses were in
13 foreclosure. Some of them had gone to sheriff sales and all
14 that process takes a lot of time. We were going from the
15 sheriff sale numbers.

16 Sometimes at the sheriff sales the bank takes the
17 property back and then sells them in a third-party --

18 THE COURT: Is that what happened in this case?

19 MS. HELART: The numbers are more accurate now
20 because they have been sold. So the numbers -- I can give out
21 each one of them, but the numbers add up to 340,789 for just
22 the five counts. We have more accurate numbers for all the 14
23 counts with which she was charged.

24 THE COURT: Why shouldn't that make a difference at
25 this point on her resentence? Why shouldn't that information

1 be used?

2 MS. HELART: Well, there's very -- there are a lot
3 of ways that loss can be calculated. One important way is how
4 much did the banks loan out? And this crime is lying to
5 lenders to get them to give up their money.

6 Frankly, I need to go back and reconstruct how we --
7 the numbers of the loans, they are listed in the indictments,
8 and see how much those added up to. But loss amounts are
9 exceedingly difficult to come up with. But one of the
10 features is -- one of the things we look at is how much did
11 the banks loan out? How much loss did she cause to the bank?

12 Now, just because the bank is able to recoup, great.
13 They still do have a piece of property, but she did cause the
14 bank to loan out a lot of money.

15 THE COURT: Okay.

16 MS. HELART: And if I could say one more thing?

17 THE COURT: Sure.

18 MS. HELART: This is outside the record, but in any
19 case, including this one, based on that theory, the amount of
20 loss that the banks give out is well over 2.3 million dollars,
21 but we do try to tame it to something reasonable. So banks
22 loan out a lot of money and, yes, they're able to recoup some
23 because they've got the property.

24 THE COURT: So the number on paragraph 70 would not
25 always be the same as the number on restitution?

1 MS. HELART: It's rarely the same. And it was the
2 same in this case, but -- at the time of sentencing. It is
3 different now. It's just the point in time where the parties
4 stopped talking and we went in for sentencing.

5 THE COURT: So the actual number on restitution on
6 these counts would be the 340,789?

7 MS. HELART: Yes. If the Court is asking for the
8 five counts of conviction that's the number 340,789. And we
9 have the victim lender --

10 THE COURT: Now, you recall in the 7th Circuit's
11 opinion the statement in which the court addresses the
12 appropriate burden on the relevant conduct issue, and that is
13 this -- it's on page 20 of my advance sheet -- "Where the
14 dismissed counts to constitute relevant conduct, the act in
15 those counts must have been both attributable to Locke and
16 also part of the single scheme common to the counts of
17 conviction."

18 Do you agree with that?

19 MS. HELART: Yes.

20 THE COURT: How does that impact your argument?

21 MS. HELART: Is the Court saying that I can give you
22 information outside of the --

23 THE COURT: No, no, just what's in the record. If
24 there's anything in the record that supports that, that's what
25 you're permitted to argue.

1 MS. HELART: Okay. Then there is none in the
2 record, other than the list of lenders that shows that there
3 was more than five. But we did not put that story in as to
4 the other unconvicted counts.

5 THE COURT: Okay. Thank you.
6 Anything else, counsel?

7 MR. RAIFORD: Your Honor, I would like to put in the
8 record previous counsel's objections to the P.S.R. report
9 originally, as well as the response counsel received back from
10 defense counsel, as Defendant's Exhibit 1 and Defendant's
11 Exhibit 2.

12 THE COURT: Those would be the original P.S.R.?

13 MR. RAIFORD: It would be defense counsel's original
14 objections.

15 THE COURT: And why do you need to do that?

16 MR. RAIFORD: As I talked about before, I didn't
17 want to just reference something without giving Your Honor at
18 least a chance to look at it.

19 THE COURT: I've got it right here in front of me,
20 but I don't know that it needs to be added as a separate
21 exhibit.

22 MR. RAIFORD: Very well. I didn't know you had it
23 before you.

24 THE COURT: I think it's fairly obvious that the
25 appellate court read it too.

1 MR. RAIFORD: The one thing we would ask Your Honor
2 to do is not hold Ms. Locke accountable for a loss amount that
3 we know now to be incorrect and that is vastly different from
4 the restitution amount. And as you consider how to sentence
5 her, you take that into account what -- at least address the
6 situation as it currently lies.

7 THE COURT: Okay. Thank you.

8 MR. RAIFORD: Thank you.

9 THE COURT: Well, looking initially at paragraph 70
10 where it says the offense involves a loss exceeding a million
11 dollars. It is true, as pointed out by the government's
12 counsel, that that offense characteristic calculation is not
13 the same as the actual amount of loss calculated by selling
14 what's left. Under the guidelines, it is a loss to the bank
15 at the time, and I think that is appropriately calculated and
16 was at the time and is still as a 16.

17 Paragraph 71. I do think that the appropriate
18 calculation under paragraph 71 is a zero instead of 2. And I
19 think that, given my understanding of the 7th Circuit opinion
20 in this case, that that's an appropriate determination. So we
21 will proceed then to -- well, I'll now find that the
22 appropriate adjusted offense level calculation in this case is
23 a 25 and the criminal history category is I. And that
24 calculation leads us to a 57 to 71 recommended range.

25 I will hear now from counsel -- yes?

1 MR. RAIFORD: Your Honor, would you mind going over
2 the calculation? We come up to, I think, a 23.

3 THE COURT: I'm sorry, 23 is right. Twenty-three is
4 correct. I said 25 and that's not right. Twenty-three is
5 correct. The 23 is a 57 to -- or a 46 to 67 months. So 46 to
6 67 is the 23 range. Thank you for pointing that out.

7 All right. Now I'll hear from you and your client
8 again as to what you think the appropriate sentence ought to
9 be.

10 MR. RAIFORD: Your Honor, can we have a moment to
11 speak with our client?

12 (Counsel conferring with the defendant off the record.)

13 THE COURT: Yes, sir.

14 MR. RAIFORD: We've spoken with our client. She
15 doesn't wish to say anything further at this time.

16 THE COURT: Would you like to make an argument about
17 what you think the appropriate sentence ought to be now?

18 MR. RAIFORD: Yes, Your Honor. For the -- in the
19 guideline range, we would ask for obviously the lowest
20 possible.

21 Ms. Locke was convicted of five counts of wire fraud.
22 We know now, even though you've ruled the loss amount could be
23 reflected to one million, actually the loss to the bank is
24 significantly less. Even if you take the actual original loan
25 amount, it doesn't give you one million dollars. Therefore,

1 we'd ask that you take that into consideration and give her
2 toward the lower amount of the sentencing range.

3 We'd also note that Ms. Locke really does not have any
4 criminal history before this. As far as I know, she has been
5 a model citizen in prison, caused no problems, is not young
6 anymore, is not a danger to society. I doubt there's any
7 chance that she -- when she gets out of prison that you or any
8 other judge will ever see her face again.

9 So, therefore, taking age, the nature of the crime,
10 her past behavior, her good behavior since she's been
11 sentenced, we'd ask you be as lenient as you possibly can.

12 THE COURT: Thank you. I'll hear from the
13 government.

14 MS. HELART: The government realizes the Court sat
15 through the entire four day trial in this case, but some
16 highlights of how extensive this fraud was is really worth
17 noting again.

18 This case involving Counts 8, 9, 10, 11 and 14 of the
19 indictment showed that Ms. Locke went to Drees Homes officials
20 and made up a big story from the beginning. She made up a big
21 story in two important ways. One is she told them that she
22 needed their spec homes, spec homes that didn't have finished
23 basements, and that she wanted to find her own company to
24 finish them, and she had a story as to why she needed all that
25 they had. Now Drees Homes officials wanted her to start

1 slowly. They invited maybe six to seven to start off with and
2 we have the resulting 8, 9, 10, 11 and 14.

3 The basements in every one of them never got finished.
4 The money that was pulled out to finish those basements went
5 to made up companies and went into Ms. Locke's pocket. The
6 companies had names of variations of L & K Properties, L & K
7 Interior Designs, L & K Property Management, et cetera.

8 In those properties, she also came out with realtor
9 fees on top of that and for five months made nearly half a
10 million dollars, as I recall from the amounts that the trial
11 testimony.

12 She used false social security numbers for the
13 property she bought in her own name, 9, 10, 11 and 14, and a
14 false social security number for her son Scott Locke that she
15 directed that property of Count 8 in his name.

16 She used fake invoices for these basements. She
17 inflated her own income, her own monthly income. We knew that
18 officially from an analysis of the bank accounts, numerous
19 bank accounts with the variations of Locke & Key, L & K, L & K
20 Property Management, et cetera. And that the bank account
21 balances in those bank accounts could not have supported the
22 incredibly inflated amounts that she said she made it on a
23 monthly basis.

24 She submitted the down payment for Count 8, the Scott
25 Locke property. She used in Count 10 another egregious thing,

1 which is making up false leases using family members names,
2 using other peoples names. Pretty much, if they were an
3 acquaintance, it was fair game.

4 In three of the counts she used Tamara Clark as a
5 person to fake up two letters. Ms. Clark's testimony was that
6 she had done work of reviewing tax returns for Scott Locke on
7 Count 8, but had not done any work and had not written the
8 letters that I believe showed up in Counts 9 and 11. Tamara
9 Clark's name also showed up in a false way on one of these
10 false residential leases in Count 10.

11 The defense is incorrect that the five counts loan
12 amounts were not even a million. The calculation that was
13 just done is 1.8 million. And I have a more specific amount.
14 That's how much the banks loaned out on these five properties,
15 1.8 million on just these five counts.

16 Ms. Locke did this scheme big. There were maybe one
17 to two payments made on each of these properties. They all
18 went into foreclosure. They all of them sold at sheriff
19 sales. The only work that was ever done on any of them was
20 some work on her Count 9 Dawn Ridge property where she got the
21 \$50,000 theater system ordered and then paid for a small part
22 of it.

23 She's just a menace. She went big with her fraud.
24 I'm not convinced we won't see her again. I think we need to
25 send her a very strong message still that fraud does not pay

1 and we are asking for 67 months in this case.

2 THE COURT: I thank you.

3 MS. HELART: And --

4 THE COURT: I'm sorry.

5 MS. HELART: -- I do have the names and I can give
6 them to probation afterwards for the victim lenders for the
7 five counts.

8 THE COURT: Thank you.

9 MR. PELZ: If I could -- I rise to address one thing
10 because there wasn't misspoke -- anything misspoke by
11 Mr. Raiford. He didn't understand what I was telling him when
12 I was trying to explain the stuff in the interim.

13 The first time we ever heard any suggestion that the
14 loss amount should be calculated somewhat differently than the
15 way we calculated the loss amount at the time of the first
16 sentencing hearing was just in this presentation here today.
17 The count on which we now know there was inaccurate
18 information is Count 1. I want to make sure on Count 9 what
19 was in the supplemental addendum of the presentence report --
20 I'm certain that's on the record from the initial time -- said
21 that the loss amount for Count 9 had been calculated at
22 1,110,267.

23 What I advised Mr. Raiford is that the information
24 we've been provided today was that the original loan amount on
25 that property was \$627,738, and that if we used that entire

1 amount as the loss amount for number 9, for Count 9, and used
2 the loss amounts for the other counts as represented by the
3 government at the time of the first hearing, you'd be under a
4 million dollars. That's what I represented to Mr. Raiford.
5 That's what he should have said and I just wanted to make sure
6 we clarified the record --

7 THE COURT: So, you heard the government say the
8 five count loan amounts are 1.8 million.

9 MR. PELZ: Yes. But the government at the first
10 hearing never ever tried to calculate the amount of loss as
11 the total amount of the loan. They were acknowledging that
12 the loss amount had to reflect the fact that they in fact got
13 the property and had value. So they were never out that
14 entire amount. That wasn't their loss. They never had zero
15 value on tholes properties. The property always had some
16 value.

17 I think what the government said at the time of the
18 hearing, they were valuing it based upon the "sheriff sale
19 amount," what they thought it was worth; that they
20 subsequently amended those using what they were actually able
21 to sell it for. And the information we've been given out
22 tells us that sometimes that was more than what they estimated
23 and sometimes it was less than estimated. But if we use the
24 actual amounts that -- if we use the estimated amounts, once
25 we correct -- with respect to the loss on number 9 -- if we

1 use the estimated amounts on sheriff sales we're under a
2 million dollars. If we use the actual amount, based on what
3 they were ultimately able to sell, we're way under a million
4 dollars. In fact, I think the government says we're now at
5 \$340,000, which isn't even a third of the way to a million.

6 The only way you get above the million is to use the
7 theory that they never advocated at the initial sentencing
8 hearing in terms of how you compute loss. It can't be --
9 there isn't evidence, not even a preponderance of the
10 evidence, that the actual loss can be based on the total loan
11 amount because they were never at risk of losing all the loan.
12 They at all times had something of value to --

13 THE COURT: Point me to the paragraph in the
14 guidelines that tells you how to arrive at the loss figure for
15 the specific offense characteristic under 2B1.1(b)(1)(I) it
16 looks like. What does that say?

17 MR. PELZ: I don't know, Your Honor.

18 THE COURT: Well, do you know?

19 MR. RAIFORD: Sort of, yes. I don't want to speak
20 as if the gospel truth. I understand there's a couple ways
21 you can calculate loss under 2(b)(1) and III basically. One
22 being the intended loss, I believe, or intended loss or the
23 actual loss. I hope that's close enough.

24 THE COURT: That is close enough. And so, directly
25 responding to your concern, I don't believe that the 7th

1 Circuit said they couldn't change an argument on what's
2 already in the record.

3 MR. PELZ: I'll accept -- I'll accept that, Your
4 Honor, for purposes of --

5 THE COURT: You don't have to sign it or anything.

6 MR. PELZ: I'm not going to sign anything. I do
7 know, if we disagree, you know, only one of our opinions
8 counts. I do know that much.

9 THE COURT: Well...

10 MR. PELZ: But I would say --

11 THE COURT: Today maybe.

12 MR. PELZ: -- if it's intended loss, it couldn't be
13 the total amount of the loan. You can't have that. You
14 can't -- that's not a reasonable --

15 THE COURT: Your argument may be with the guideline
16 commissioners rather than with me.

17 MR. PELZ: Yeah, I mean -- and they have some burden
18 of proving that. Even that by a preponderance of the
19 evidence, they can't be that they've shown that the intended
20 loss was the entire loan amount.

21 It's very unfortunate that we have this misinformation
22 that got into the record. Everybody was operating under this
23 misinformation. You were. The 7th Circuit was. I mean,
24 there is a way to reconcile this so it will be irrelevant. I
25 mean, I believe the highest amount you can give under 21

1 points is the same as the lowest amount you can give under 23
2 points, which is 46 months.

3 But I did want to make sure the record was clear with
4 respect to what that error was. And it was only Mr. Raiford
5 who uncovered this. And we didn't even uncover it based on
6 the information at the time we were in the 7th Circuit, so we
7 couldn't raise this issue in the 7th Circuit because we didn't
8 yet have enough information to feel comfortable that we were
9 right. He suspected there was a miscalculation, but he wasn't
10 certain.

11 I just did want to try to get the record as clear as I
12 could, Your Honor, for your purpose as well as for the -- most
13 importantly for your purpose, so you can fairly consider this
14 as you make your decision here with respect to what to do.

15 And again, if Mr. Raiford misspoke, I feel it was my
16 responsibility for not having necessarily given him the right
17 information. I was trying to say, if you used the full amount
18 for the Count 9, because that's the only one where there seems
19 to be some dispute as to what the loss was.

20 THE COURT: Okay. And we'll let the record remain
21 silent of where the problem is that you can't explain very
22 well or that he can't understand very well. How about that?

23 MR. PELZ: Thank you.

24 THE COURT: I call on the probation officer here --
25 and somewhat of a surprise to you -- but in the calculation

1 under the paragraph "specific offense characteristic involving
2 the loss," in calculating the loss, knowing what the amounts
3 were, that of the -- of these loans, where in the guideline do
4 we get that direction?

5 MR. JAROSH: My guess -- not my guess. My
6 understanding is that it's probably under application notes.
7 Probably clarified a little bit more. 2B1.1 is quite large.

8 THE COURT: And it has to do with what the defendant
9 acquired also, doesn't it? Isn't it what she acquired as a
10 result of her fraud?

11 MR. JAROSH: I believe that falls under that, yes.

12 THE COURT: I think it does too. I think now I've
13 heard all the arguments, yes.

14 Do you want to step up here with your client, please?

15 I do find that -- as I calculated the guidelines
16 prior -- that to end up with an adjusted offense level of 23,
17 I do think that's appropriate. And the amount of these
18 mortgages, as a specific offense characteristic under 70, is
19 appropriately calculated under the guidelines.

20 Then we start, Ms. Locke, again with each of these
21 counts could result in a total of 20 years imprisonment. And
22 we learn that from the Congress of the United States in saying
23 that for each count, as I say, you could get 20 years. So
24 that tells me how serious to take a wire fraud sentencing as
25 it comes before me.

1 Then, as we know, there are different wire frauds.
2 Wire fraud is the kind of statute that several, well,
3 multitudinous group of facts can support a wire fraud
4 conviction. But in this case I look at these guidelines to
5 see how they attack the problem of determining a sentence;
6 that is, what factors do we consider? And we look first at
7 the base offense level, and that's the generic fraud, so
8 that's a 7. And that's the guideline commissioners' attempt
9 to arrive at a fair number that would reflect the harm caused
10 so that all of us, as we sit across the country looking at
11 wire fraud cases, can begin at the same place and then have an
12 attempt to keep these kinds of offenses somewhat consistent in
13 our sentencings. And the loss makes a great deal of
14 difference, makes the most difference in fact, as you know in
15 your case. I found that the over a million is appropriately
16 calculated under the guidelines, so the 16 is added.

17 And I have found that under the 7th Circuit direction
18 and under the evidence before the Court, as I had restricted
19 it by granting the motions in limine pursuant to my
20 understanding of the 7th Circuit's directive, there will be no
21 additional two points for 10 or more victims because there's
22 no finding that there were 10 or more victims. And then
23 there's -- we do have the two for -- or didn't have those two
24 the last time either, so it arrives at the 23.

25 And I look at 3553(a) to see if the guidelines

1 appropriately reflect my concerns, and appropriately put us in
2 the range that would satisfy all of the 3553(a) factors, and I
3 look again at the nature and circumstances of the offense.

4 I did go over the nature and circumstances of the
5 offense at the original sentencing. I was struck at that time
6 by the amount of misinformation that you gave to the
7 authorities here that loaned you this money. The basements
8 never got finished. The money went to your made up companies.
9 There were false social security numbers; four for you and one
10 for your son; fake invoices; inflated income statements; false
11 leases; and a couple other letters that were alleged to have
12 been written in support of some of these transactions that
13 were never in fact signed by the individuals whose names
14 appeared thereon. I found also that this is a fairly
15 complicated scheme and a large scheme.

16 And then I looked at your history and characteristics
17 and, of course, we acknowledge that this is your only brush
18 with the criminal system. And under the guidelines -- before
19 the guidelines I might have taken more into account the number
20 of felonies than the guidelines do, but the guidelines tend to
21 reflect the seriousness of the crime and the amount of the
22 harm, the money actually instead of the number of crimes.
23 Although I am concerned about the fact that there are five
24 crimes in this case.

25 I want this sentence to reflect the seriousness of the

1 offense and promote respect for the law and provide just
2 punishment. Those all work together. And those concerns are
3 generally reflected in the factors the guidelines reflect;
4 that is, the amount of money involved and the nature of the
5 scheme. And I want to afford adequate deterrent conduct to
6 you and to others.

7 I suspect that I'm a little less concerned about your
8 future of criminal conduct than is the government in this
9 case. But in any case, my concern again is the nature of this
10 crime and all of the different misrepresentations that were
11 made and that I've just outlined them. The fact that there
12 are five felonies involved, that again would drive me to the
13 higher end of the guidelines.

14 And so, for those reasons I'll sentence you to 67
15 months, which is the high end of the guideline range, which I
16 think again that guideline range is a reasonable one.

17 You will make restitution in a different amount than I
18 had ordered the last time. Restitution will be ordered in the
19 amount of 340,000 -- is it 189 or 789?

20 MR. RAIFORD: Your Honor, the guideline range is it
21 46 to 57 months?

22 THE COURT: Yes, 46 to 57. Right, I'm sorry.

23 MR. RAIFORD: I thought you said 67.

24 THE COURT: I probably did. I probably did. I had
25 written that down, but it's 57. That's wrong. I was wrong.

1 I apologize. It's 57. I'm glad we invited you today.

2 MR. RAIFORD: Happy to be here.

3 THE COURT: Yes. So it's 57 months. And the
4 restitution amount is the \$340,789.

5 We will divide that up pursuant to the list that we
6 just got presented today, which I don't have and I can't,
7 therefore, read it into the record. The list of the victims
8 will be next to them.

9 Any payment that's not paid in full will be divided
10 proportionately among the victims named. Payment is to be
11 made directly to the Clerk of the U.S. District Court for
12 disbursement to the victims.

13 The defendant will notify the United States Attorney
14 for this district within 30 days of any change in mailing or
15 residence address that occurs while any portion of the
16 restitution remains unpaid.

17 Any unpaid restitution balance will be paid during the
18 term of supervised release at a rate of not less than 10
19 percent of defendant's gross monthly income.

20 I find that she does not have the ability to pay
21 interest and I waive any interest requirement. She shall
22 notify the probation officer of any material change in
23 economic circumstances that might affect her ability to pay
24 restitution.

25 I am not ordering a fine based on her financial

1 resources and future ability to pay.

2 Upon release from imprisonment, she will be placed on
3 supervised release for a term of two years on each count to be
4 run at the same time.

5 Within 72 hours of release from the custody of the
6 Bureau of Prisons, she shall report in person to the Probation
7 Office in the district to which she is released.

8 While on supervised release, the defendant shall not
9 commit another federal, state or local crime. She will not
10 possess a firearm, ammunition, destructive device, or any
11 other dangerous weapon.

12 She will cooperate with the collection of a DNA sample
13 and refrain from any unlawful use of a controlled substance.

14 She is suspended from drug testing mandated by the
15 Crime Control Act of 1984 based on my determination that she
16 poses a low risk of future substance abuse.

17 Further, you shall comply with the standard conditions
18 as adopted by the Judicial Conference of the United States, as
19 well as the following additional conditions:

20 She will pay restitution that's imposed by the
21 judgment that remains unpaid at the commencement of the term
22 of supervised release.

23 She will provide the probation officer access to any
24 requested financial information; not incur new credit charges
25 or open additional lines of credit without the approval of the

1 probation officer; and not be self-employed, employed by
2 family or friends, or employed in the real estate or mortgage
3 industry without the permission of the probation officer.

4 I ordered her before to pay the special assessment of
5 \$500, which is a hundred dollar assessment on each count.

6 That hasn't been paid or has it? Has that been paid
7 through the Inmate Financial Responsibility Program?

8 MR. PELZ: Not all of it, Your Honor. Part of it.

9 THE COURT: I won't reimpose that whole amount.
10 Whatever remains is still due.

11 You're remanded then back to the custody of the United
12 States Marshal.

13 Anything else?

14 MR. RAIFORD: I do not believe so, Your Honor.

15 THE COURT: Anything else from the government?

16 MS. HELART: No, Your Honor.

17 THE COURT: Thank you.

18 THE CLERK: All rise.

19 (Court adjourned at 3:40 p.m.)

20 * * *

21

22

23

24

25

CERTIFICATE OF COURT REPORTER

I, Fred Pratt, hereby certify that the foregoing is a true and correct transcript from reported proceedings in the above-entitled matter.

S/FRED PRATT	December 29TH , 2011
<hr/>	
FRED PRATT, CSR	
Official Court Reporter	
Southern District of Indiana	
Indianapolis Division	